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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

"WILLIAM LOE,"
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
REDACTED

NATHAN Z. DERSHOWITZ
Dershowitz & Eiger, P.C.
350 Fifth Avenue
New York, New York 10118
(212) 967-0667
COUNSEL OF RECORD

ALAN M. DERSHOWITZ
AMY ADELSON
ANDREW SHEAR
Of Counsel

Attorneys for Petitioner
"WILLIAM LOE"

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QUESTION PRESENTED FOR REVIEW

Whether, in light of Santobello v. New York, 404 U.S. 257 (1971), which held that a prosecutor's promises to a defendant are enforceable, the federal courts retain the power to enforce oral promises made by a prosecutor to induce a defendant to cooperate with the government, despite Section 5K1.1 of the Sentencing Guidelines, which transferred to the prosecutor the power to decide when a cooperating defendant should receive a sentence reduction.

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The original opinion of the Court of Appeals for the Ninth Circuit *****

The unpublished memorandum was filed under seal pursuant to a sealed order set forth at App. 6.

JURISDICTION OF THIS COURT

The initial opinion of the Court of Appeals *****

A timely petition for rehearing was filed as well as a motion to seal the opinion. *****

and replaced by a published amended opinion and an unpublished sealed memorandum addressing those issues not addressed in the amended opinion. Pursuant to the published opinion the judgement of the District Court was vacated in part and the case remanded for resentencing. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

U.S.S.G. § 5K1.1 **Substantial Assistance to Authorities (Policy Statement)**

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

STATEMENT OF THE CASE

The Sentencing Guidelines have transferred from the courts to the prosecutor the power to determine whether a defendant who has cooperated should receive a benefit at sentencing. Such extraordinary power lends itself to extraordinary abuse, as this case illustrates.

In this case, the government extracted cooperation from an uncounseled defendant with verbal assurances that his cooperation would inure to his benefit. The government then used the information provided by the defendant to file additional charges against him, and not only refused to

recommend that the defendant receive a benefit, but actually urged the sentencing court to upwardly depart and punish the defendant more severely than the Guidelines would otherwise permit. The Ninth Circuit Court of Appeals upheld the government's refusal to honor its oral agreement with this uncounseled defendant.

This Petition raises important questions which go to the very heart of the plea bargaining process: How strictly should the courts construe verbal promises made to a defendant in an effort to gain his cooperation, and in the absence of a violation of constitutional magnitude, can a court downwardly depart from the Sentencing Guidelines when the defendant has cooperated, indeed, has provided "substantial assistance," but the prosecutor refuses to move for a downward departure. In short, this Petition asks this Court to seriously reexamine its jurisprudence regarding substantial assistance departures under Section § 5K1.1 of the United States Sentencing Guidelines.

Defendant "William Loe" ("Loe") *****

****** Prior to agreeing to this request, "Loe" asked if he could speak to a lawyer, but was told he could not. ***** This initial effort by "Loe" *****

Within hours of his arrest, and while he was still uncounseled, an Assistant United States Attorney met with

"Loe" to explain to him the terms of their agreement. Using precisely the language used in § 5K1.1 of the Sentencing Guidelines, the prosecutor told "Loe" that he "would not promise any specific benefits," but that if "Loe's" "cooperation constituted 'substantial assistance,' his assistance would be brought to the attention of the judge at the time of his sentencing." (emphasis added) He also told "Loe" that the benefits of this cooperation *****

After this crucial conversation with the prosecutor, "Loe", who was still uncounseled, *****

The prosecutor did not put his assurances in writing. But "Loe", having not had the benefit of conferring with counsel, clearly understood that, in exchange for his cooperation -- rendered at great personal risk to himself and his family -- either he or his wife would receive a very specific benefit -- a reduced sentence.

After his arrest and cooperation, "Loe" finally had the opportunity to meet with counsel appointed by the Court. At that point, the prosecutor indicated that if "Loe" cooperated further his sentence would be further mitigated. But, after "Loe" retained counsel, the government refused to work with him any further. Defense counsel then made two written plea offers. In both, "Loe" sought a letter pursuant to Section 5K1.1 of the Sentencing Guidelines and, in the first, *****

Both offers were rejected by the government.

The government not only rebuffed "Loe's" plea offers, it "upped the ante." Despite having assured "Loe" that it would not do so in light of his cooperation, the government filed a superseding indictment, which added a count charging "Loe" with engaging in a continuing criminal enterprise, pursuant to 18 U.S.C. § 848(b)(2)(A) (the "CCE count"). By adding the CCE count, the government increased the minimum sentence "Loe" faced from 20 years to life. *****

Facing a life sentence, "Loe" and the government initially reached a plea agreement under which the government would dismiss most of the counts of the superseding indictment and recommend a sentence of 292 months.

At the plea allocution, however, the District Court expressed concern over whether "Loe" and the government were in agreement over the consequences if the government determined that "Loe" had not fully satisfied his "debriefing" requirements. The Court then instructed the parties to go back and work out their differences. When the parties returned to Court, defense counsel notified the Court that the agreement had collapsed, not because "Loe" had provided untruthful information, but because the government, knowing that "Loe" *****
suddenly insisted that he implicate her, a condition the government knew full well "Loe" could not and would not accept.

Nevertheless, "Loe" decided to enter a plea and the government agreed to dismiss one count of the superseding indictment, the count charging a continuing criminal enterprise

-- a count that was based largely on the *****

Following his plea, "Loe" moved to compel the government to make a motion for a downward departure pursuant to U.S.S.G. § 5K1.1 and for a downward departure pursuant to 18 U.S.C. § 3553(b). "Loe" argued that he had been induced to cooperate by the promise that he would receive a benefit in exchange, but, in the end, the only benefit he received was the dismissal of the CCE count, *****

The government not only opposed "Loe's" motion, it sought an upward departure which would guarantee that "Loe" would spend the rest of his life in prison.[1]

After conducting a sentencing hearing, the District Court denied the defendant's motion for a downward departure, finding that, because this particular United States Attorneys' office, as a matter of practice, does not "agree to make [a 5K] motion," the prosecutor in this case had not promised to "make or consider making" a motion. The Court then upwardly departed on a basis not argued by the government prior to the hearing and imposed a sentence of 480 months.[2]

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[1]Although the government contended that it had never promised to seek a downward departure, it did not seriously challenge the core of "Loe's" claim that his cooperation "substantially assisted" the government *****

[2]The Court determined that, including the departure, "Loe's" offense level was 41, which has a sentencing range of 360 months to life. The Court then imposed the 480 month sentence, 20 years supervised release, and a fine of $3 million.

*****

"Loe" received a sentence of 40 years, in essence, a life sentence. In short, "Loe", *****

The Court of Appeals for the Ninth Circuit vacated the sentence, ruling that the upward departure was improper because adequate notice had not been given to the defense as to the grounds upon which the departure was based. (App. 5) The Court of Appeals, however, in a single sentence, affirmed the District Court's denial of "Loe's" motion to compel the government to request a downward departure pursuant to U.S.S.G. § 5K1.1, holding that the District Court "did not clearly err" in determining that the prosecutor made no promise to submit a downward departure motion pursuant to U.S.S.G. § 5K1.1. (App. 9)

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER THE FEDERAL COURTS RETAIN THE POWER TO ENFORCE AN ORAL PROMISE BY A PROSECUTOR TO REWARD A COOPERATING DEFENDANT EVEN WHEN THE PROSECUTOR REFUSES TO MOVE FOR A DOWNWARD DEPARTURE PURSUANT TO SECTION 5K1.1 OF THE UNITED STATES SENTENCING GUIDELINES

Under the Sentencing Guidelines, the discretion afforded the prosecution to reward a cooperating defendant often clashes with the inherent obligation of the courts to ensure fairness and justice in the sentencing process. Because the Sentencing Guidelines drastically shifted the balance of power in the sentencing process from the court to the prosecutor, serious questions have arisen about the ability of the courts to remedy prosecutorial abuses that, before the Guidelines, might have been addressed by the court's power to determine the appropriate sentence.

This Petition presents one of those questions in its starkest terms. It involves an uncounseled defendant who provided substantial cooperation to the federal government. He was induced to do so by a prosecutor who represented to the defendant that, if he provided, in the prosecutor's own words, "substantial assistance," his cooperation would be brought to the attention of the sentencing court. Although the prosecutor carefully refrained from promising to provide a specific benefit, the import of his representation was clear: if the defendant provided "substantial assistance" -- the very words of the Guidelines -- he would receive the benefit the Guidelines contemplate: notification to the court in the form of a "5K motion."

In Santobello v. New York, 404 U.S. 257 (1971), this Court held that a prosecutor's promises to a defendant, even if they are not memorialized in writing, are enforceable. In the words of this Court, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement of consideration, such promise must be fulfilled." Id. at 262.

Prior to the enactment of the Guidelines, in light of the Santobello principle, the judiciary would have had the power to remedy the deception perpetrated on "Loe". The sentencing court could have considered the totality of the circumstances in determining "Loe's" sentence. It could have found the promise initially made by the prosecutor to be ambiguous, but nonetheless have taken into account the fact that "Loe" was uncounseled, and that he obviously relied on the prosecutor's assurances, and cooperated believing he would receive a benefit. Even if the prosecutor then repudiated his "agreement," the sentencing court would have been empowered to give "Loe's" cooperation sentencing consideration and to impose sentence accordingly.

The Guidelines, however, transferred from the impartial court to an adversarial party the power to determine whether a defendant's cooperation merits a reduction in sentence. Thus, at least as the law now stands in the Ninth Circuit and elsewhere, (though not uniformly, see pp.11-13 infra.), the type of verbal inducement made by the prosecution in this case is essentially unreviewable.

But that unjust result is not mandated by the Guidelines. This Court could and should step in to reaffirm that the Santobello principle survives the Guideline regime. To do so, the Court must reexamine the parameters of an early Guidelines case, Wade v. United States, 504 U.S. 181 (1992), which suggested that prosecutors have virtually unfettered discretion in this area.

In Wade, decided when the Guidelines were still fresh, this Court determined that, in the absence of a motion by the government, federal courts retain the power to review a prosecutor's decision to refuse to make a 5K motion, and to craft a remedy, only if the refusal is "based on an unconstitutional motive." Id. at 185-86. Citing Santobello, however, the Court also specifically noted that Wade did not involve "any agreement on the Government's behalf to file a substantial assistance motion." Id. at 185.

Wade implied that there are only two instances where the courts retain the power to downwardly depart based on a defendant's cooperation: if the prosecutor explicitly promises to make a substantial assistance motion in a plea agreement, or if the prosecutor's refusal to make a 5K motion is motivated by a patently impermissible concern, for example, the defendant's race or religion. Id. at 186. The Court was not presented with, and did not consider, the all too common situation presented here -- a promise not memorialized in a written plea agreement, and then repudiated, not for unconstitutional reasons, but for punitive ones.

Since Wade, the lower courts have struggled with the myriad situations in which prosecutors do not fulfill their promises to move for a downward departure. Several courts, relying on the Santobello principle, have held that, where the government has made a promise in a plea agreement to move for a downward departure, a court can downwardly depart even absent a 5K motion and even though the prosecutor's refusal to make the motion was not based on an unconstitutional motive. See, e.g., United States v. Isaac, 1998 WL 164879 (3d Cir. 1998); United States v. Leonard, 50 F.3d 1152 (2d Cir. 1995); United States v. Hernandez, 17 F.3d 78 (5th Cir. 1994); United States v. De La Fuente, 8 F.3d 1333 (9th Cir. 1993); United States v. Dixon, 998 F.2d 228 (4th Cir. 1993).

In those cases, however, because there were explicit promises, the courts did not address the far more difficult question of how to interpret a promise that is made in order to induce a defendant to cooperate, but that is not later put into a plea agreement or is carefully couched in vague or ambiguous language. A few courts have recognized the danger inherent in shielding prosecutorial discretion from the scrutiny of the courts. For example, in United States v. Melton, 930 F.2d 1096, 1098 (5th Cir. 1991), the practice of the United States Attorney's Office was to promise to make a 5K motion in a letter of transmittal, but to eliminate the promise from the plea agreement itself. As the Fifth Circuit stated, in vacating the defendant's sentence after the government refused to move for a downward departure, "[w]hat is clear . . . is that the government may neither misrepresent its intentions nor renege on representations reasonably relied and acted upon by defendants . . . ." Id. at 1098.[3]

In United States v. Ming He, 94 F.3d 782, 785 (2d Cir. 1996), the Second Circuit, finding the shift of power from the "neutral judge" to the prosecutor "troubling," vacated the defendant's sentence where the prosecutor had debriefed the defendant, who had previously pled guilty and agreed to cooperate, without his attorney being present. In that United States Attorney's office, prosecutors promised to file 5K motions based on their evaluation of the information provided by the defendant during a debriefing session, but insisted that those debriefing sessions be held without counsel being present.

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[3]Melton predates this Court's decision in United States v. Wade, 504 U.S. 181 (1992), but the Fifth Circuit, in United States v. Watson, 988 F.2d 544 (5th Cir. 1993); cert. denied, 510 U.S. 1048 (1994), reaffirmed Melton's holding in light of Wade.

In Ming He, the government made a perfunctory 5K motion, but disparaged the defendant's cooperation based on certain statements made in the uncounseled debriefing. In remanding the case, the Second Circuit, exercising its supervisory power, directed that federal prosecutors within its jurisdiction allow defendants to have counsel present at debriefings, Id. at 793. The Court also remanded for resentencing, with instructions that the trial court consider the prosecutor's impropriety in evaluating a downward departure. Id. at 793.

Unfortunately, the lower courts are not in agreement over the extent of the courts' power to enforce a prosecutor's representation that he will reward the defendant's cooperation. While Melton and Ming He are examples of how a few courts have taken steps to remedy prosecutorial excesses in this area, the Ninth Circuit, in this case, refused to examine the prosecutor's conduct with the same degree of care, and as this case demonstrates, there is no uniform approach to these situations.[4] The lack of judicial standards for determining what is an enforceable promise to make a downward departure

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[4]Some courts, in contrast to the approach taken in Melton and Ming He, have taken the position that, despite unjust results, they are powerless to act in the face of Section 5K's motion requirement. See, e.g., United States v. Fairchild, 940 F.2d 261 (7th Cir. 1991) (recognizing the injustice of inducing pleas by dangling the promise of a 5K departure without telling the defendant the level of assistance required to obtain it, but holding the court has no power to correct this inequity); United States v. Jones, 58 F.3d 688
(D.C. Cir.), cert. denied, 516 U.S. 970 (1995) (criticizing the United States Attorney's Office procedure under which a committee had sole discretion to determine whether a 5K motion would be made and did so in total secrecy making a claim of bad faith by the defendant virtually impossible to sustain).

motion is made worse by the apparent lack of uniform standards within the Justice Department for regulating how prosecutors are to conduct their plea negotiations and when they must provide a 5K motion. As the Second Circuit noted in Ming He, "the absence of any 'visible standard to guide the prosecutor's exercise of discretion' . . . has made the transfer of authority from judge to prosecutor especially troubling." 94 F.3d at 788 (citation omitted).[5]

According to the District Court in this case, the United States Attorneys' office which prosecuted "Loe", as a matter of general practice, does not "agree" to make a 5K motion. By refusing to make an explicit "promise," that office can extract cooperation from a defendant, who, once he has cooperated, must take a plea since he has admitted his misconduct, and then effectively insulate the prosecutor's conduct from judicial review. The prosecutor gets the information and a plea form the defendant with no concomitant obligation. Presumably, other offices are less cagey, and, consequently, defendants prosecuted by those offices who provide cooperation are more likely to see their cooperation rewarded. In short, whether the defendant is rewarded for his cooperation might depend less on what he has provided then on where he has been prosecuted.[6]

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[5]The magnitude of this issue should not be underestimated. Nearly 20 percent of federal criminal convictions between 1994 and 1996 involved departures under Section 5K1.1. Linda Drazga Maxfield and John H. Kramer, Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice (United States Sentencing Commission, 1998).

[6]This geographical disparity was recently documented in an article in Rolling Stone magazine which reported that in the Eastern District of Pennsylvania forty-eight percent of defendants receive sentence reductions as a result of their cooperation, close to the national median, while in the Central

One of the primary purposes of the Guidelines was to limit disparity in sentencing. See 28 U.S.C. § 944(b)(1)(B); U.S.S.G. § 1A3. However, as a recent report by the Sentencing Commission shows, because the standards for determining when to make substantial assistance motions vary from district to district, the transfer of discretion from the court to the prosecutor has actually led to disparity. Linda Drazga Maxfield and John H. Kramer, Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice (United States Sentencing Commission, 1998); see also Cynthia Kwei Yung Lee, Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines, 42 U.C.L.A. L. Rev. 105, 179 (1994) (criticizing Section 5K1.1 as "merely replac[ing] extremely broad judicial discretion with extremely broad prosecutorial discretion").

The Commission found variations in the policies in the various districts, in the degree to which those policies were followed, and in the standards for determining what constitutes "substantial assistance." According to the Commission, 33.3% of defendants who provided "potentially risky assistance" by supplying "tangible evidence," did not receive 5K motions. Maxfield and Kramer, at 10. *****

Wade was decided six years ago, when the courts were still unsure of how the Sentencing Guidelines would impact on

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District of California, where "Loe" was prosecuted, the figure is seven percent. As the article points out, the result is "ninety different drug laws - one for each district . . . ." William Greider, Mandatory Minimums: A National Disgrace, Rolling Stone, April 16, 1998 at 42, 92

the plea bargaining process. Now, it is clear that there is confusion, unfairness, and disparity in sentencing decisions. The only way to ensure that defendants are not misled and to restore some balance to the adversary process is for the courts to more carefully scrutinize prosecutorial promises to cooperating defendants, particularly to defendants like "Loe", who are not represented by counsel.

In short, it is time for this Court to reexamine Wade, reaffirm Santobello, and set standards for the lower courts to follow in evaluating when a prosecutor's promises, albeit promises that are not incorporated into a formal plea agreement, must be kept. Given the overwhelming power which the government has under the Guidelines, this Court can and should make it clear that any ambiguities in a prosecutor's statements to a defendant must be construed in the defendant's favor.[7] Likewise, the Court should make clear that, where a prosecutor has intentionally misled a defendant in order to obtain cooperation, the sentencing court is empowered to prevent any resulting injustice by downwardly departing, or by exercising its supervisory powers to grant an appropriate remedy to the defendant.[8]

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[7]This is a position which the Ninth Circuit had previously taken, United States v. De La Fuente, 8 F.3d 1333, 1337-38 (9th Cir. 1993); United States v. Anderson, 970 F.2d 602, 607 (9th Cir. 1992), amended 990 F.2d 1163 (9th Cir. 1993), but which it declined to apply in this case.

[8]For example, in this case, the prosecutor reneged on his promise that he would not use information provided by the defendant to obtain a superseding indictment. The prosecution then used the CCE count added as a result of "Loe's" cooperation as a basis for enhancing "Loe's" sentence. Under these circumstances, an appropriate remedy might be dismissal of the superseding indictment.

The alternative is an increasingly chaotic process where individual United States Attorney's offices engage in different practices, with widely varying results. Some offices will encourage their prosecutors to be clear in their promises, particularly where they are dealing with uncounseled defendants. Undoubtedly, as in this case, there will also be situations where the prosecutor, knowing that his office does not "agree to make the motion," by choosing his words carefully, will be able to give a defendant the impression that he is being promised a reduced sentence when, in fact, he is being promised nothing at all.

This Court has long recognized that "the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse." Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978). In this case that potential has been realized. To prevent such abuses in the future, this Court should grant the Petition and make clear that Santobello is still a guiding principle and that the courts still retain the authority to downwardly depart from the Guidelines when a prosecutor has promised to reward a cooperating defendant, but then refuses to make a "substantial assistance" motion under the Guidelines.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully,

NATHAN Z. DERSHOWITZ
DERSHOWITZ & EIGER, P.C.
350 Fifth Avenue, Suite 7912
New York, NY 10118
(212) 967-0667

COUNSEL OF RECORD

Alan M. Dershowitz
Amy Adelson
Andrew Shear

Of Counsel